No. 11025

In the United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, Administrator,
Office of Price Administration,

Appellant,

vs.

CRAWFORD AND DOHERTY FOUNDRY COMPANY, an Oregon corporation,

Appellee.

APPELLEE'S BRIEF

BARRETT D. RANDALL and
WILBER HENDERSON,
Porter Building,
Portland, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND

SUBJECT INDEX

TABLE OF CASES CITED

No. 11025

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER BOWLES, Administrator,
Office of Price Administration,

Appellant,

vs.

CRAWFORD AND DOHERTY FOUNDRY
COMPANY, an Oregon corporation,

Appellee.

APPELLEE'S BRIEF

ADDITIONAL STATEMENT

Appellant has omitted from his "Statement of the Case" facts which we consider are pertinent to the consideration of this case on appeal. We are, therefore, directing the attention to certain additional facts.

Appellant's right to prevail on this appeal is dependent entirely upon whether there is any evidence to support the Findings of Fact made by the lower Court. If the findings are supported by evidence and are not clearly erroneous, then the lower Court's judgment must be sustained.

These findings relate to two distinct questions:

First: Those which bear upon that part of Appellant's complaint relating to the alleged violations of the General Maximum Price Regulation, and

Second: Those which bear upon that part of Appellant's complaint relating to the alleged violations of Maximum Price Regulation 244.

As to those falling under the first heading, attention is directed to the fact that this case was tried in the lower court by the attorneys for the Appellant on the theory that it was a question of fact as to whether or not the prices charged to the Marine Electric Co. during the month of March, 1942, were *for the same commodities* sold to Tuerck-MacKenzie, Bingham Pump Co., and the others referred to in Appellant's complaint; and further, that it was a question of fact as to whether Marine Electric Co. was *a purchaser of the same class* (R-38 to 49, 199 and 200) as Tuerck-McKenzie and others.

As to the Court's findings which relate to the part of the complaint bearing upon Maximum Price Regulation 244, we direct attention to the following circum-

stances: Preceding the effective date of MPR 244, Don B. Card, Secretary-Treasurer of Appellee, made several visits or calls at the Portland office of the Office of Price Administration (R-246, 247) for the purpose of obtaining an interpretation of General Maximum Price Regulation and MPR 244 as they appertained to Appellee's system of fixing prices on Meehanite gray iron castings then being sold by Appellee to its customers. Such interviews left Mr. Card in a state of bewilderment and confusion, and to avoid any possible charge of violating either the spirit or the wording of MPR 244, Appellee entered into agreements with its several customers that it would submit invoices at an advanced price which it was endeavoring to have approved, but that the customers would pay Appellee only the amount approved by the OPA. (Findings VIII, IX, X, XI, XII — R-219 et seq.). Sales made after October 26, 1942, to the purchasers under consideration were made only pursuant to the foregoing arrangement.

The fact that Appellee had the agreement with its various customers not to collect the additional amounts unless such increased prices were approved by the OPA was known by Appellant before instituting this suit (R-21 Ex. 29). Appellee adduced evidence to support the foregoing contention and the Court made a finding thereon and upon that Finding based a conclusion that the Appellee had not violated MPR 244.

SUMMARY OF ARGUMENT

This Court has before it only the question whether or not the Findings of Fact of the lower Court are clearly erroneous (Court Rule 52-a). We assume that it will be conceded that if there is evidence to support the Findings, the decision of the lower Court should be affirmed on the assumption that the Judge of the lower Court had an opportunity to judge of the credibility of the witnesses (Rule 52-2). The question of the sufficiency of the evidence may be divided into two parts: first, that which supports the Findings bearing upon the alleged violations of GMPR, and second, that bearing upon the alleged violations of MPR 244.

As to the alleged violations of GMPR, Appellee contends as to the Findings made thereon that:

(a) Appellant tried this case in the lower Court on the theory that it was a *question of fact* as to (1) whether or not the prices of Marine Electric Co. for the month of March, 1942, were *for the same commodities* as sold to Tuerck-MacKenzie and others, and (2) whether Tuerck-MacKenzie and others were *purchasers of the same class* as Marine Electric Company within the contemplation of GMPR; and, therefore, Appellant may not be permitted in this court to assert a different theory, that is, that *purchasers of the same class* means that each purchaser is a class unto himself; and

(b) The lower Court's Findings to the effect that the prices of Marine Electric Co. for month of March, 1942, were for "similar castings" and that Marine Electric Co. is "*a* purchaser of the same class" as Tuerck-MacKenzie and the others referred to in Appellant's complaint are conclusive on this Court as Findings of Fact.

As to the alleged violation of MPR 244, Appellee contends that the evidence conclusively supports the lower Court's Findings that the deliveries of the commodities to Tuerck-MacKenzie and others were made only under an arrangement whereby prices would be paid on the basis of those fixed by Office of Price Administration, and all in excess of OPA prices as indicated by invoices to be rendered would be withheld by the purchasers pending a determination of Appellee's right to demand and receive increased prices. Appellee further contends the question of sale and delivery is one of fact and that the arrangement just referred to did not constitute a sale in violation of the OPA regulations within the contemplation of the Emergency Price Control Act of 1942, and such Findings are conclusive on this Court as to such facts.

ARGUMENT IN RE APPLICATION OF GENERAL MAXIMUM PRICE REGULATION

The lower Court by Finding VI (R-21) determined as a fact:

(a) That Appellee during the month of March, 1942, sold to Marine Electric Co. of Portland, Oregon, castings similar to those sold to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron & Steel Corp., and Iron Fireman Mfg. Co., and

(b) That the prices charged Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron & Steel Corp., and Iron Fireman Mfg. Co., during the period from August 1, 1942, to October 26, 1942, did not exceed the highest prices charged to said Marine Electric Co. during the month of March, 1942, for similar castings.

The subject matter of Finding VI was one of fact. An issue of fact had been tendered by the pleadings which was susceptible of proof or disproof. Evidence was offered and received without objection on this issue. Appellant, although privileged to move to have the Finding amended or to make additional findings, did not do so. (R-270, 272).

Appellant in this court by specifications of Error 4 (R-11) assigns error by the Court in making Finding VI. Appellant attempts no review of the evidence that was offered on this issue but argues from the

premise that the words: "the highest prices charged by the seller * * * for the same commodity * * *" is susceptible of only the interpretation that "commodity" refers only to the commodities sold to the particular customer. Appellant asserts (R-15) that the language admits of no other interpretation and the price criterion is made as clear as language can make it. Of course, exaggeration is not argument and it has no place in logic. Obviously if the writer of GMPR had intended to say "the highest prices charged by the seller during such month for the same commodity or service *to the same customer*", he would have so written the regulation.

In other words, if GMPR had been intended to freeze the price to each customer at the price that customer had been sold the commodity during the month of March, 1942, it would have been very easy to have so provided. The words "to the same customer" were neither used nor can they by the ordinary rules of construction be implied in the language used. According to the plain import of the language used the object of the regulation was to freeze the price of "the commodity", not the particular price between the manufacturer and each of his customers.

APPELLANT MAY NOT ASSERT THEORY IN APPELLATE COURT DIFFERENT THAN CONTENTIONS IN TRIAL COURT

Appellant initiated this case by a complaint wherein he based the right of recovery under GMPR (Par. IV R-4) upon the fact that the Appellee sold Meehanite gray iron castings during the period from May 11, 1942, to October 26, 1942, *at prices higher than the maximum prices for which Appellee sold said commodities to a purchaser of the same class during the month of March,* 1942.

These allegations were denied by Appellee and thereby an issue of fact was raised, not as to whether Appellee sold to purchasers at prices higher than such particular purchasers had paid in March, 1942, but at prices higher than paid by a *purchaser of the same class.*

Counsel for Appellant at no time claimed that the regulation insofar as "purchaser of the same class" is concerned meant the particular purchaser. Appellant's position throughout the trial was that it was a question of fact (R-38-49). We direct special attention to the following statement by Appellant's counsel in the lower Court (R-41, 42):

> " * * Our position is that on the four customers that were involved in this particular action, namely, Tuerck-MacKenzie Company, and Bingham Pump Company, and Willamette Iron & Steel Corporation, and the Iron Fireman Manu-

facture Company, that the first two stated purchasers of the same class, that the (10) other two also were purchasers of the same class but still a different class.

"Now just what is a purchaser, or what are the items or facts that go to make up or determine whether or not a purchaser falls into one class or another, seems to me involves a number of other things than just looking to the particular casting or to the fact that the same or similar metal might be used in a casting. I think any classification of a purchaser that we have to look to their dollar volumes, any discounts that might be granted, credit items, and the average poundage that is sold to the particular purchaser.

"I think, as does Mr. Henderson, that the size and the shape of the casting has something to do with it. There is a matter that seems to me very important. That is the location of the purchaser. That is, whether he is—whether deliveries can readily be made, whether he is accessible to the facilities of a seller. Then of course to me the most important thing to detemine whether or not a purchaser falls within the same class is the price that was charged. I think that is probably the most important item to consider.

"Now, as I say, I don't agree with Mr. Henderson's idea of the formula or the rule which he seeks to establish, but I do feel that the whole question is one of fact and Mr. Henderson has, of course, the privilege of putting on any testimony, any evidence in support of his contention, (11) and of course we have that privilege, too, and it is then up to the Court to determine, as a matter of fact, whether or not the prices are to be governed by those charged to the Marine Electric Co., or to be governed by the previous charges to these same purchasers here."

And again (R-45 and 46):

> "Mr. Wagner: Well, our position, Mr. Henderson, is that the Marine Electric Company prices during March of 1943, or during the other freezing period, August of 1941 to February 1st of 1942, does not govern the prices for the four purchasers that are involved and set forth in the complaint. That is, the Marine Electric in our position is a very small purchaser. They are purchasing items that are not at all comparable to the castings that are involved here, and, therefore, those prices cannot govern the prices for castings which were sold to Tuerck-MacKenzie, or Bingham Pump, nor can those prices govern the castings which Crawford and Doherty sold to Willamette Iron & Steel and the Iron Fireman Company. Those are entirely different types of castings, and they are entirely different types of purchasers. That is our position. It would seem to me that if you wish to decide that the Marine Electric Company——that their freezing date prices are the governing ones, you certainly have that privilege, but then it comes down to this question of fact we are discussing: As to what is the customs of the same class, whether or not these prices govern or whether these particular prices govern that were taken from the previous records of Crawford and Doherty to the same buyers.
>
> "The Court: To the same buyers?
>
> "Mr. Wagner: Yes, with the exception of Iron Fireman Manufacturing Company. They had no purchases during the freeze (15) periods, but we contend that the prices at which Willamette Iron & Steel Corporation were sold castings governs there, because of the identical size and especially of a casting which was for Liberty Ship motors."

We also direct attention of the Court to a response made by Appellant's counsel to a question by the Court, (R-199):

"The Court: Let me ask my question this way: If Mr. Henderson made his point stick about the Marine Electric, would that throw $3500 off of this $16,000, or would it leave only $3500 in your claim? Which way does that go?

"Mr. Wagner: It would throw it off of the sixteen thousand. But let me explain just a little bit further, if the Court please. The Marine Electric had a higher price than is set forth during March of 1942 in the bill of particulars, then (121) that would reduce the $16,168 by the $3500, if it were determined that the Marine Electric Company were a purchaser of the same class.

"The Court: I understand. That is all true.

"Mr. Wagner: But as to the other sales General Maximum Price Regulation 244, as to all four of the concerns, I think the proviso governs and that each concern is governed by its base price; that is the highest net price charged during the base period to it as a customer, itself.

"The Court: But Iron Fireman wasn't in business?

"Mr. Wagner: Iron Fireman falls within the first classification of that same proviso under 244, namely, that the maximum price would be the highest net price at which the seller sold or offered for sale such casting to a purchaser of the same class during that period that just precedes the proviso. Now Willamette Iron & Steel and Iron Fireman we say are purchasers of the same class.

"The Court: Purchasers of the same class?

"Mr. Wagner: Yes.

"The Court: But if he also qualifies Marine Electric—

"Mr. Wagner: As a purchaser of that class:

"The Court: Yes—that would throw out Iron Fireman?

"Mr. Wagner: Iron Fireman.

"The Court: And Iron Fireman is about $3400?

"Mr. Wagner: $3897. (122)

"The Court: Then if he makes his point stick he would throw out $3500 plus $3800?
"Mr. Wagner: That is right."

All testimony adduced by Appellee to establish prices of Marine Electric Company in March, 1942, was received without objections by counsel for Appellant (R-181-185, 194) as not being competent to prove the "highest price charged by a seller for a particular commodity". In this connection counsel for Appellant attempted by a cross-examination of V. O. Stirnweis (R-193, 185 et seq.) to establish the fact that Marine Electric Company was of a different class than Tuerck-MacKenzie and the other purchasers referred to in Appellant's complaint.

When Appellee offered in evidence price quotations (Ex. 27) from Appellee to Marine Electric Company, the only objection offered thereto by counsel for Appellant was that "it was not evidence of a delivered price" (R-204-5-6). Counsel made no objection that evidence as to the prices by Marine Electric Company was not competent and material under GMPR.

When V. O. Stirnweis, witness for Appellee, was interrogated (R-21) as to the application of the prices of Marine Electric Company to those of Iron Fireman as shown by Ex. 28, counsel for Appellant made no objections to the competency or materiality of such evidence under GMPR. Don B. Card, Secretary-Treasurer of Appellee was called as a witness and testified (R-233-245) in respect to the price schedule of the

Marine Electric Company as the same related to prices charged to Tuerck-MacKenzie and others. All of this evidence was received without any objection by Appellant insofar as the same related to establishing a base price under GMPR on the prices of Marine Electric Company. Appellee's Exhibit 30 is a comparative price schedule showing prices to Marine Electric Company during March, 1942, and prices for sales to Bingham Pump Company and Tuerck-MacKenzie Company during July, August, September, and October of 1942. When this exhibit was offered (R-233), counsel for Appellant in specifying his objections to this exhibit said:

> " * * * The exhibit reflects figures that are nothing more than conclusions, conjectures and opinions, and establishes nothing which indicates deliveries of any castings at any particular prices."

No intimation was made that it was incompetent or irrelevant because under the Regulation the price *to the particular purchaser* was the proper base.

Exhibit 31 is made up of eleven copies of invoices rendered by Appellee to Marine Electric Company in January, 1942. Exhibit 32 is made up of seven copies of invoices rendered by Appellee to Marine Electric Company in March, 1942. When Exhibits 31 and 32 were offered in evidence, Appellant made no objection that they were incompetent or irrelevant because under the Regulation *the price to the particular purchaser only* would be admissable. Counsel for Appel-

lant specified the basis for the objections (R-243) in the following language:

> "That there is no evidence to establish the fact that this purchaser is one in the same class as any other purchaser involved in this controversy."

Counsel by this objection gave recognition to the fact that the question of "class" was one of fact and that the question before the Court was whether or not Marine Electric Company belonged to the same class as Tuerck-MacKenzie and the others. Counsel for Appellant elaborated his position on his objection in a colloquy with the Court that ensued immediately after the objection was made as follows (R-243):

> "The Court: Well, you always are very fair. I admire you for being distinct like that. But passing whether they are of the same class, they would have a bearing, wouldn't they?
>
> "Mr. Wagner: No, your Honor. I tried to make that clear a short while ago in the difference in the method of pricing that is being used here.
>
> "The Court: You mean per—
>
> "Mr. Wagner: Per each casting and not per pound of the casting.
>
> "The Court: Well, passing that question also, if from your point of view they were priced the same, and this purchaser was in the same class, they would have a bearing?
>
> "Mr. Wagner: There still is the question of whether or not the casting is substantially the same casting.
>
> "The Court: Well, passing that——(151)
>
> "Mr. Wagner: Well, those are the grounds of the objection.
>
> "The Court: Yes; I understand; but passing

all of those things, they would have a bearing on the statute and regulation, wouldn't they?

"Mr. Wagner: Yes, that is true, as to the point of time only.

"The Court: As to what?

"Mr. Wagner: As to the point of time, excluding—

"The Court: Yes.

"Mr. Wagner: ——excluding, of course, all the other things.

"The Court: I understand. But how would they work, laying those other questions aside? I want the benefit of your calculation.

"Mr. Wagner: Well, those are about the only questions, as far as pricing is concerned, your Honor. As to Regulation 244 they can't apply.

"The Court: Cannot?

"Mr. Wagner: They cannot apply.

"The Court: Why?

"Mr. Wagner: Because of the requirement that the subsequent pricing be maintained on a per customer basis.

"The Court: 244?

"Mr. Wagner: Yes; M.P.R. 244.

"The Court: I never heard your side of that. I want to hear you now. (152)

"Mr. Wagner: As to General Price Maximum Regulation they would probably have some hearing.

"The Court: They would, wouldn't they?

"Mr. Wagner: Yes. That is, the March, 1942, deliveries would have some hearing; that is, assuming you could say the price was the same and the class of purchaser was the same."

The only rebuttal offered by Appellant was directed (R-261-266) to the sole question of whether or not Marine Electric Company belonged to *the same class of purchasers* as Tuerck-MacKenzie and others.

All of the foregoing demonstrates that Appellant tried this case in the lower Court on the theory that the question of whether or not a person was *a purchaser of the same class* was a question of fact. It is a rule apparently of universal application that parties in an appellate court are restricted to the theory on which the cause was prosecuted or defended in the court below.

This Court in the cases of Ford Motor Co. vs. Farrington, 245 Fed. 850; and Cutler vs. Cook, 78 Fed. 863; considered appeals from the District Court of Oregon and in both cases held that it would not consider contentions of Appellants that were contrary to the theory upon which the case was tried in the lower court. The following are but a few Federal Court cases that may be cited that have followed this rule, to-wit:

New York Alaska Gold Co. vs. Walbridge, 38 Fed. 2nd 199.
Commerce Trust vs. Woodbury, 77 Fed. 2nd 478.
Parrot Estate Co. vs. McLaughlin, 89 Fed. 2nd 188.
Beechwood Securities Corp. vs. Associated Oil Co., 104 Fed. 2nd 537.

Appellant tried this case in the lower court on the theory that "purchaser of the same class" meant purchasers buying the same commodities under similar conditions and that whether or not commodities were similar and the conditions were similar were questions of fact to be determined by the Court. The lower

Court resolved or decided those questions. We, therefore, submit that Appellant may not now urge this Court to consider a contention that the GMPR means that each purchaser is in a class by himself. We submit that Appellant's contention in respect to all parts of the complaint predicated on GMPR is without merit.

FINDINGS OF FACT OF TRIAL COURT WILL NOT BE SET ASIDE ON APPEAL UNLESS CLEARLY ERRONEOUS

It was the general rule of Circuit Courts of Appeal that they would not disturb the Findings of Fact of a Trial Court unless the same were clearly erroneous, even before this rule was promulgated by the Court as Section (a) of Rule 52. It also was the rule of Court that it would give due regard to the fact that the Trial Judge had an opportunity to see the witnesses while on the witness stand and, therefore, was in the better position to determine their creditability. We, therefore, will assume as a premise that this Court will not disturb the findings of the lower Court unless the Appellant is able to demonstrate that the findings clearly are erroneous.

The Court, by Finding VI (R-21) concluded as a fact that Appellee sold Marine Electric Company of Portland, Oregon, during the month of March, 1942, castings similar to those sold Tuerck-MacKenzie Company and others during the period from August 20,

1942, to October 26, 1942, and that Marine Electric Company was a purchaser of the same class as Tuerck-MacKenzie and others.

Appellant has not attempted to demonstrate that the evidence adduced in support of this Finding does not as a matter of fact support the Finding. Appellant has, instead of reviewing the evidence, cited (B-15) an official interpretation made on August 20, 1942, and another made on September 22, 1942, for the apparent purpose of demonstrating that it is imperative upon the Court to construe GMPR as meaning that a "purchaser of the same class" means each particular purchaser is a class unto himself. Counsel has also cited the cases of Bowles vs. NuWay Laundry Co., 144 Fed. (2d) 741; and Rainbow Dyeing and Cleaning Co., Inc., 150 Fed. (2d) 273, to the effect that "purchaser of the same class" means that each purchaser is in a class by himself.

These interpretations at the most are merely attempts of individuals to place a meaning upon the words and language used in connection with GMPR. These interpretations do not compel the conclusion that regardless of the facts of a particular case it must be held as a matter of law that several different parties *are not in the same class.* The lower Court has found as a fact that Marine Electric Company and others belong to the same class of purchasers of the Appellee. These interpretations may not be invoked to demonstrate that what a Court has found to

be a fact is not in effect such a fact.

In this connection we would direct attention to Bulletin No. 1 issued April 28, 1942, by the OPA on "The General Maximum Price Regulation". We quote from Section 2 thereof appearing on pages 2 and 3 of that Bulletin:

"HIGHEST PRICE CHARGED DURING MARCH, 1942

"For the purposes of this Regulation, the highest price charged by a seller 'during March, 1942,' shall be:

"(1) The highest price which the seller charged for a commodity *delivered* or service *supplied* by him during March, 1942; or

"(2) If the seller made no such delivery or supplied no such service during March, 1942, his highest *offering price* for delivery or supply during that month.

"No seller shall change his customary allowances, discounts or other price differentials unless such change results in a lower price. The 'highest price charged' shall be a price charged during March, 1942, to a *purchaser of the same class.* But if during March, 1942, a seller (a) had an established practice of making allowances, discounts or price differentials to different classes of purchasers, and (b) raised his general level of prices, but thereafter during March, 1942, made no delivery to any purchaser of a particular class, he shall, for that particular class of purchasers calculate the highest price charged by taking the highest price charged during March, 1942, to a purchaser of another class and then adjusting such price to reflect his established allowances, discounts and price differentials. No seller shall require any purchaser, and no purchaser shall be

permitted, to pay a larger proportion of transportation costs incurred in the delivery or supply of any commodity or service, than the seller required purchasers of the same class to pay during March, 1942, on deliveries or supplies of the same or similar types of commodities or services.

"SIMILAR COMMODITIES OR SERVICES"

"One commodity shall be deemed 'similar' to another commodity, if the first has the same use as the second, affords the purchaser fairly equivalent serviceability, and belongs to a type which would ordinarily be sold in the same price line. In determining the similarity of such commodities, differences merely in style or design which do not substantially affect use, or serviceability, or the price line in which such commodities would ordinarily have been sold, shall not be taken into account. One service shall be deemed 'similar' to another service if the first has the same use and purpose as the second and belongs to a type which would ordinarily be sold for the same or substantially the same price."

We also quote from Section 20 which is devoted to "Definitions and Explanations" as set out on Pages 10, 11, 12 and 13 of the Bulletin. We direct special attention to the definition of "purchaser of the same class" as set out in sub-paragraph (k) of this Section (Bulletin, page 12):

"This Regulation, and the terms appearing therein, unless the context otherwise requires, shall be construed as follows:

* * * * * * * *

"Purchaser of the same class refers to the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers (for

example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale."

It is perfectly apparent from the foregoing that the words "purchaser of the same class" were used in GMPR in their ordinary sense and not to mean each purchaser as a class unto himself. If GMPR had the meaning as contended for by Appellant, why was the definition of "purchaser of the same class" worded as it was worded? Why did not the author of Bulletin No. 1, when he came to the words "purchaser of the same class', write "purchaser of the same class means that each purchaser is a class unto himself? It seems to us that such would have been a simple way of saying what counsel for Appellant says GMPR means. Why should the author of Bulletin No. 1 in writing the definition for the "purchaser of the same class" suggest the several attributes or characteristics that might be common to different purchasers if, as a matter of fact, he meant that each purchaser was a class unto himself? The answer is obvious. At the time GMPR was promulgated, the words "purchaser of the same class' meant what the definition set forth indicates they meant.

We finally get back to this consideration. Is there anything in the interpretations suggested by Appellant that compels the conclusion that the words "purchaser of the same class" in all instances mean each

purchaser is a class unto himself? Are not the interpretations cited by Appellant susceptible of the interpretation that in certain or particular instances the words "purchaser of the same class" means each purchaser is a class unto himself, but that there may be instances where several purchasers may belong to the same class. In other words, is it not a question for the Court to determine whether or not under GMPR several persons may or may not be "purchasers of the same class"? Does not each case predicated upon GMPR depend upon the particular facts of that case?

It would seem to us that all of these questions must be answered to the effect that whether or not under GMPR purchasers belong to the same class is a question of fact to be determined by the Court in each particular case. In other words, what belongs to a class (assuming the word is used with its ordinary connotations), is a question of fact. If, therefore, in a given case a Court decides that a particular customer's relationship is so peculiar that no other customer belongs within the same class as such a customer, then the Court would decide as a question of fact that the particular customer belonged to a class of which he was the only one. If, on the other hand, the Court on evidence adduced decides that several customers belong to the same class, such finding of fact is conclusive, assuming there is evidence to support the same.

Appellant by its complaint alleged that Appellee sold to Tuerck-MacKenzie and others between May 11, 1942, and October 26, 1942, Meehanite gray iron castings at prices higher than the maximum prices for which Appellee had sold said commodities to a purchaser of the same class in March, 1942. The Appellee denied these allegations, placing this question squarely in issue. The Court, upon the evidence adduced, found in favor of the Appellee and to the effect that Tuerck-MacKenzie and others belong to the same class of purchasers as Marine Electric Company and that the sales prices to Tuerck-MacKenzie Company and others did not exceed prices charged Marine Electric Company in March, 1942. Appellant has not demonstrated to the Court that the lower Court's Findings were "clearly erroneous" or that the same are not supported by evidence. Appellee respectfully submits that there is no merit in Appellant's contention in respect to that part of the case based on the General Maximum Price Regulation.

ARGUMENT RE APPLICATION OF MPR 244

Appellant by this suit sought treble damages under Section 205-(e) of the Emergency Price Control Act of 1942 on account of castings alleged to have been sold by Appellee to certain purchasers between October 26, 1942, and March 11, 1943. The issue on this phase of the case was framed for trial in the lower Court by Paragraph VI, Plaintiff's Second

Cause of Action (R-5) as re-alleged by reference in Paragraph III of the Third Cause of Action (R-6). The allegations of this paragraph were denied by Appellee (R-9) thus putting in issue and placing upon Appellant the burden of establishing that Appellee sold castings at prices higher than fixed by MPR 244.

Appellant did not sustain the burden of proof placed upon him by the issues framed and the lower Court did not find the facts to be as alleged. The Court did find instead as set out in Finding VIII (R-22) which reads as follows:

> "The court finds that on or about the 13th day of April, 1942, defendant increased its price schedule to Tuerck-MacKenzie and Bingham Pump Company to prices above those theretofore charged said respective purchasers (16) for similar castings; that in the early part of November, 1942, defendant entered into an arrangement with the aforesaid respective purchasers to render invoices for castings delivered to them after that time upon the basis of the increased price schedule, but that notwithstanding such invoices, it was understood that such purchasers would pay only upon such invoices the amount determined by computation on the original or unrevised price schedule, or on the basis of the prices prevailing before the increase, and that the excess or difference between the amount shown by the invoice and the amount paid would be retained by such purchaser pending the determination of the validity of the increased price schedule; that since the early part of November, 1942, the defendant has continued, during the time referred to in plaintiff's complaint, to render to the aforesaid purchaser invoices and to make deliveries and receive payment in pursuance of the foregoing agreement."

The Court further found (R-23) that all sales or deliveries to Tuerck-MacKenzie during the period referred to in Appellant's complaint (October 26, 1942, to March 10, 1943) were in pursuance of the arrangement stated in the foregoing Finding, and that invoices were rendered in accordance therewith and further that Tuerck-MacKenzie in pursuance of the agreement withheld the sum of $1,784.06, the amount claimed by Appellant in this suit to be the excess over the maximum price.

The Court further found (R-23) the same facts as to Bingham Pump Company, except that the amount withheld is $3,269.38. Similar findings were made in respect to Willamette Iron & Steel Corp. (R-23). The legal consequences and effects of the facts, circumstances and conditions under which the castings were delivered to Tuerck-MacKenzie, Bingham Pump Company and Willamette Iron & Steel Corporation during the period of time in question and as set out in the Finds of Fact was a proper matter for the Court to determine. The evidence was undisputed and the Findings made follow the evidence adduced.

The Findings as made do not support Appellant's allegations as to castings having been sold at prices in excess of those fixed by MPR 244. Findings recite that deliveries were made and invoices rendered at advanced prices but with the definite and unequivocal arrangement that the purchaser would pay only the prices as approved by OPA and that the excess would

be held pending the determination of Appellee's application for an increased price schedule. These facts clearly do not support an allegation that castings were sold at prices in excess of the Regulation.

Appellant by his brief makes no attempt to show that the Findings as made were contrary to the evidence or that there was no evidence to support the Finding. Instead he labors over the meaning of certain words in the Regulation and endeavors to show that the arrangement as found by the Court was in effect a sale at prohibited prices.

Sub-section (e) of Section 205, Emergency Price Control Act of 1942, at the time this suit was instituted, read as follows:

> "If any person selling a commodity violates a Regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50.00 or treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater plus reasonable attorneys' fees and costs as determined by the Court. * * * If any person selling a commodity violates a Regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this Sub-section, the administrator may bring such suit or action under this Sub-section on behalf of the U. S. * * *"

The foregoing provides that the suit may be brought by the administrator only when such suit *may not be brought* by the purchaser. The purchaser

is limited to bring suit or action "either for $50.00 or treble the amount by which the consideration exceeded the applicable maximum prices." Let us apply this provision to the state of facts in this case. Let us assume that Tuerck-MacKenzie did not buy the commodity for use or consumption in the course of trade and was eligible to bring action. What could he ask for? The law says "treble the amount by which the consideration exceeded the applicable maximum prices". Tuerck-MacKenzie paid nothing in excess of the maximum prices. Appellee received nothing from Tuerck-MacKenzie in excess of the maximum prices. Tuerck-MacKenzie, even if it fell within the category of those who might bring action under the law, would have no cause of suit against the Appellee for the very obvious reason that Appellee has received nothing from Tuerck-MacKenzie in excess of the maximum prices. Under Sub-section (e) the Administrator may bring action only when the purchasers do not fall within the proper classification. The basis for such action, however, is the same where the action is brought by the purchaser as when brought by the administrator.

Counsel for Appellant by argument appearing on pages 35-36 of his brief suggests that the "arrangement" described in the Finding defines a status falling within the scope of the words "offering", "attempting to do any of the foregoing", "over-charge", and "price means the consideration demanded" as used in the law and the Regulations.

The scope of the facts covered by the Finding precludes any such assumption or conclusion. It is apparent from the Finding that Appellee was not "offering" the castings at an excessive price because the Findings show that they were delivered and were paid for at the prices allowed by the Regulation and no further price was payable except on the approval of the OPA.

The Findings demonstrate that Appellee was not "attempting to violate the Regulations" for it shows that Appellee was not going to accept any additional amount except with the approval of OPA.

The Findings show that there was no "overcharge" because it shows the commodities were sold at the prices permitted by the Regulations and that any further amount would be payable only with the approval of OPA.

The Findings shows that Appellee was not "demanding" a consideration in excess of the maximum prices because it shows the commodities were sold at the prices permitted and no additional amount would be payable except with the approval of OPA.

According to the Finding, the *sales price* was within the Regulation. The amount that was withheld pending a decision by OPA did not make up the *sales price. It would become a part of the sales price only if and when such additional amount was approved by the OPA.*

Appellant does not suggest any Regulation or Court decision that by the most liberal interpretation holds that selling an article for a price within OPA regulations amounts to selling it for a price in excess of OPA regulations *because an invoice is rendered at the time of sale for a higher price with the definite understanding with the purchaser that no additional amount will be expected unless the OPA approves the increased prices.*

What amounts to a "sale" is a justicable question, therefore, when a Court finds that a sale is completed at one price with an increased amount payable *only if* the same is approved by the OPA, such Finding by the Court is conclusive on that fact.

Appellant cites the case of UNITED STATES vs. LUTZ, 142 Fed. 2d 985, as having some application to the question before the Court. That was a criminal case. The question of intent was one of primary consideration. An outright sale had been made at a price in excess of that fixed by the Regulations. The defense was based upon the contention that the price had not been paid although it was a cash sale. The only thing left undone was collecting the price that had been fixed as the purchase price for the sale. The distinction between the facts of that case and this case is obvious. In the case at Bar the Court found as a Fact that *all deliveries after October* 26, 1942, *were in pursuance of an unequivocal agreement that only the approved prices would be paid and nothing further*

would be paid except upon the approval of the OPA.

We respectfully submit that Appellant has failed completely to establish that the Lower Court's Findings were "clearly erroneous," therefore, Appellant's contention based on the application of MPR 244 to the facts in this case is without merit.

We have not directly addressed ourselves to some of the other matters discussed by Appellant for the reason that it seems to us the only question before the Court is whether or not the Findings of the Lower Court are "clearly erroneous". For instance, Appellant devotes some space to the "good faith" which the Court covered in Finding XV. This Finding was based upon not only the testmony of witnesses but doubtlessly on the Court's appraisement of the witnesses while on the witness stand. Nothing said by counsel warrants the conclusion that the Court's Findings were "clearly erroneous". We therefore do not believe that there is any reason to take up seriatim the various contentions made by Appellant since they are all comprehended within the one question: Are the Findings "clearly erroneous"?

CONCLUSION

1. Appellant tried this case in the Lower Court on the theory that whether or not purchasers were of the same class was a question of fact for determination by the Trial Court. Therefore, Appellant may not take a different position in this court in respect to

that matter and all claims of Appellant in this case based upon GMPR are without merit.

2. Under GMPR the question of whether or not purchasers are of the same class is a question of fact and Findings of a Trial Court made in respect thereto will not be set aside or disturbed unless it is demonstrated that they are clearly erroneous.

3. What amounts to a sale at a price in excess of MPR 244 is a question of fact to be determined by a Trial Court. The Trial Court having determined that question as one of fact, the same will not be disturbed on appeal unless the Appellant demonstrates that the Finding is clearly erroneous.

Appellee respectfully submits that the decision of the Lower Court in this case should be affirmed.

Respectfully submitted,

BARRETT D. RANDALL
and WILBER HENDERSON,
Attorneys for Appellee,
Porter Building,
Portland, Oregon.